IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.V.K.BALI
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 30TH NOVEMBER 2006 / 9TH AGRAHAYANA 1928

CRL.A.No.794 of 2004(B)

S.C.No.415/2003 OF THE COURT OF THE SESSIONS JUDGE, THRISSUR
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APPELLANT: ACCUSED:-

BABURAJ, S/O. KADAVIL KOTTUKAL VELAPPAN,
EASTERN SIDE OF AYIRAMKANNI TEMPLE,
ENGANDIYOOR VILLAGE, CHAVAKKAD TALUK.

BY ADV. SRI.RAJIT.

RESPONDENT: COMPLAINANT:-

STATE OF KERALA,
REPRESENTED BYTHE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY ADDITIONAL DIRECTOR GENERAL OF PROSECUTIONS
SRI.V.K.MOHANAN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/11/2006, THE COURT ON 30/11/2006 DELIVERED THE FOLLOWING:

V.K.Bali,C.J. & S.Siri Jagan,J.

Crl.A.No.794 of 2004-B

Dated, this the 30th day of November, 2006

JUDGMENT

V.K.Bali,C.J.

Baburaj, the appellant herein, was tried under Section 302 of Indian Penal Code for intentionally causing the death of his wife. The trial culminated in his conviction under Section 302 I.P.C., for which he was sentenced to undergo imprisonment for life, vide order dated 1st March, 2004 passed by the Sessions Court, Thrissur. The prosecution secured conviction of the appellant on the basis of circumstantial evidence. As to whether the circumstances relied upon by the prosecution were such that may complete the chain incriminating the appellant is the question to be decided in this appeal. Surely, the answer to this question would lie in the facts leading to the death of Geetha and the circumstances as sought to be proved by the prosecution.

2. The occurrence leading to the death of Geetha, the wife of the appellant, took place on the intervening night of 31st January and 1st February of 2002 at 1.30 A.M. The F.I.R. with

regard to the incident came to be lodged by the brother of the deceased, Babu.O.R. (P.W.1) on 1.2.2002 at 5.00 A.M., which was recorded by M.G.Sivaraman, Assistant Sub Inspector of Police (P.W.8). While reporting the death of Geetha, the wife of the appellant, the first informant got mentioned in the F.I.R. that his sister, aged 32 years, was killed by his brother-in-law Baburaj. He had a Cable T.V. network at Vatanappilly. His sister had been married to the appellant and was residing to the east of Aayiramkkanni Temple, Engandiyoor since the last nine years. In his brother-in-law's house, in addition to him (brother-in-law) his sister and their two children were living. Their elder son, Brown, is 7 years old and the daughter, Anizha, is 3½ years old. His brother-in-law was conducting the business of selling groceries in front of his house. On the eventful day, in the early morning at 2.30 hours, he received information over telephone from Manoj, who is the son of his uncle, that there was some problem between his brother-in-law and sister. He along with Dileep, the son of his father's elder brother, reached his brother-in-law's house at Engandiyoor by 3.00 O'Clock in the morning. He saw people gathered there. On enquiry made by him with Vinayan,

the elder brother of his brother-in-law, he told him that there was a quarrel between his sister and brother-in-law at night and the appellant killed Geetha by strangulating her. When he looked in to the room of the house, he saw his sister Geetha lying dead on the cot. He knew that there used to be quarrels occasionally between his sister and brother-in-law. The incident took place by 1.30 A.M. on 1.2.2002. The scene of occurrence was 5 Kms. away from the Police Station.

3. The prosecution endeavoured to bring home the offence charged against the accused by examining Dr.Cyriac Job, P.W.7, who stated that he was working as Assistant Professor and Deputy Police Surgeon, Medical College, Thrissur on 1.2.2002 and had conducted post-mortem examination on the body of Geetha, aged 32 years on the said date. It was a body of a moderately built and nourished female. Eyes of the dead body were closed, subconjunctive haemorrhage was present on the right eye, Cornea was hazy and finger nails were blue. He noticed multiple small black live ants on the hairs and neck area. The face was excessively bluish. He noticed multiple ant bite marks over an area of 6x2 cm. left side of neck and behind 1.5 x 1 cm.

left side of chest on the body. Rigor mortis was established and retained all over. Post-mortem staining was present at the back fixed. The doctor found the following ante-mortem injuries on the dead body of Geetha:

> "1. Abrasion 0.5 x 0.3 cm left upper lip 0.7 cm below ala of left nostril.
>
> 2. Abrasion 0.8 x 0.3 cm on right cheek 3 cm outer to nose.
>
> 3. Pressure abrasion 5 x 0.8 cm front of neck horizontal right end 3 cm below jaw border 3.5 cm outer to midline, left end 1.5 cm outer to midline 3 cm below jaw border, brownish black.
>
> 4. Contused abrasion 6x 5 cm on right side of neck horizontal front end 3 cm below ear lobule.
>
> 5. Abrasion 1 x 0.3 cm left side of back of abdomen 8.5 cm outer to midline 7.5 cm above iliac rest.
>
> **Internal**
>
> 1. Contused abrasion 0.3 x 0.2 cm lower lip 0.8 cm below lip border on the midline.
>
> 2. Dissection of the neck was done in a bloodless field in layers. Contusion confined to the subcutaneous layer seen underneath external injury No.4.
>
> Blood infiltration 2 x 1.7 x 0.3 cm on the left side of neck around the upper part of thyroid cartilage with fracture of the cartilage. Underneath was seen Hyoid bone was intact".

In the opinion of the doctor, the death was due to constrictive force applied to the neck. The doctor proved certificate, Exhibit P3, issued by him. The doctor further stated that the fracture of thyroid cartilage was due to pressure applied on the neck. The application of force on the neck would result into asphyxial death. He also stated that such application of pressure would be sufficient to cause death in the ordinary course of nature. In cross-examination, he stated that he could not state whether constrictive force was applied by human hand or by some other material. Injury No.3 could be caused only by ligature material and not by hand. There was struggle at the time of death. If pressed on the neck with hands, finger print will be there, but that could be appreciated by fingerprint experts only. He stated that in case of asphyxial death, colour of the face and lips would become blue and in the certificate, he had noted that face was excessively bluish.

4. Babu.O.R., the first informant, who was examined as P.W.1, deposed in tune with the F.I.R. lodged by him. He reiterated that there used to be quarrels frequently between his

sister and her husband and whenever there was such quarrels, she used to come to his house and after some days she used to return after there being a compromise. In cross-examination it was suggested to him that he had not stated to the police that Geetha and her husband used to quarrel between them and after quarrelling, she used to come to his house and such a statement was made for the first time in Court, but he denied the suggestion. Suku Brown, the son of the appellant and deceased, was examined as P.W.2. The learned trial Judge was convinced after putting some questions to him that the child witness, 11 years old at the time, was capable of giving evidence and understood the questions put to him. He was, thus, administered oath and examined. He stated that usually he, his mother and his brother used to sleep together. A question was put to him whether his father and mother were happy together or they used to quarrel, to which he answered that they were happy together. He answered in the negative to the question put to him that he had heard weeping on the night she died. He stated that his mother used to go to her house when there were special occasions. He did not know the time at which his mother died,

even though he stated that it was at night time. When he got up in the morning, his mother's sister (Valiyamma) told him that his mother had died. He then stated that he is living with his father. He stated that he would not know how his mother died. Inasmuch as, but for stating that his mother had died at night, he had not stated anything that may incriminate the appellant, it appears that he was not cross-examined. Dharmapalan, examined as P.W.3, stated that Geetha was his wife's elder sister's daughter. On 31st January, 2002 at early morning hours, at 3.00 A.M., he received a phone call that Geetha was killed by her husband and he should immediately go there. Manoj was the person who told him that. Both him and his wife reached their house immediately. At that time the appellant was standing there outside. He and his wife entered into the house, where many people were gathered. Geetha was lying on the cot with her legs drooping down. He stated that he would not know anything more about the incident. This witness was also not cross-examined. Santhosh, examined as P.W.4, stated that he was staying in the northern side of the house of the appellant. He knew the wife of the appellant, but he would not know how she had died. Only the

appellant, wife and two children were living in the house. The husband and wife used to quarrel occasionally. Two years ago, i.e. on 31st December at midnight Geetha died. He along with 5 to 10 persons went to her house. Vinayan, the elder brother of the appellant, told that Geetha was dead and, thus, they came to know about the death of Geetha. In cross-examination he stated that the appellant used to drink alcohol occasionally. The appellant was a good mannered person and that is how he was known in the locality. The appellant had no enemies in the locality. Vinayan, the brother of the appellant, who was examined as P.W.5, turned hostile and was cross-examined by the Public Prosecutor. Anil, another neighbour of the appellant, was examined as P.W.6. But for stating that there were quarrels between the husband and wife on certain occasions, he did not depose anything against the appellant. He too was not cross-examined. Sivaraman, Additional Sub Inspector of Police, examined as P.W.8, proved having recorded F.I.R. lodged by Babu.O.R. (P.W.1), brother of the deceased. C.K.Ramachandran, Circle Inspector of Police, Valappad, examined as P.W.9, deposed with regard to the steps he had taken while investigating the

case.

5. The appellant made a statement under Section 313 of the Code of Criminal Procedure and besides denying the incriminating materials put to him, stated that he was innocent.

6. From the evidence, gist of which has been given above, what appears to this Court is that the son and brother of the appellant, examined as P.Ws.2 and 5, did not support the prosecution case. In so far as the brother of the appellant is concerned, he was cross-examined by the Public Prosecutor. In so far as the son of the appellant is concerned, it appears that he would not support the prosecution case as he was living with his father till that date, i.e. from the date of incident till the date he came to depose before Court. He was not declared hostile, nor cross-examined, nor was he even confronted with the statement made by him under Section 161 of the Code of Criminal Procedure. The evidence of these two witnesses would be of no avail to the prosecution, even though it may be mentioned that the son of the appellant stated that his father was at the house on the day when his mother died. This fact otherwise also stands proved. In so far as other witnesses are concerned, they too

would not throw any light on the incident or complicity of the appellant in commission of the crime, but for that there used to be quarrels between the appellant and deceased and further that the appellant was present in the house on the intervening night of 31st January and 1st February of 2002. What emerges from the evidence is, thus, that the prosecution could rely upon motive of crime, which can be said to be frequent quarrels between the appellant and his wife, the appellant had the opportunity to kill his wife and that the death of Geetha was homicide, which certainly took place in the house where only she along with her husband and children were residing, coupled with the circumstance that no explanation plausible or otherwise is furnished by the appellant as to how she died.

7. Learned counsel representing the appellant vehemently contends that the prosecution was unable to prove the time when Geetha died. It is urged by him that she died far before the time as alleged by the prosecution and further that in any case it was an accidental death. If the Court may not find substance in the contention aforesaid, learned counsel contends that no conviction on circumstantial evidence as mentioned above

could be based as chain of circumstances incriminating the accused was not complete. No positive conclusion that the appellant alone had committed the crime could be drawn, thus contends the learned counsel.

8. We have heard learned counsel for the parties and with their assistance, examined the records of the case. The occurrence, it may be recalled, had taken place in the intervening night of 31st January and 1st February of 2002, approximately at 1.30 at night. At 2.30 P.M. on 1st February, 2002, Dr.Cyriac Job (P.W.7) had conducted post-mortem on the dead body of Geetha. There would be approximately a time lag of 13 hours between the death and the post-mortem examination. Rigor mortis was established and retained all over, whereas post-mortem staining was present at the back. As per Modi's Text Book of 'Medical Jurisprudence and Texicology' Twenty-first Edition, the time of onset of rigor mortis varies greatly in different cases, but the average period of its onset may be regarded as three to six hours after the death in temperate climates, and it may take two to three hours to develop. In India, it usually commences in one to two hours after death. In the voluntary muscles rigor mortis

follows a definite course. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck, face, chest and upper extremities, and lastly extends downwards to the muscles of the abdomen and lower extremities. Last to be affected are the small muscles of the fingers and toes. Rigor mortis passes off in the same sequence. In so far as duration of rigor mortis is concerned, in India the usual duration or rigor mortis is twenty-four to forty-eight hours in winter and eighteen to thirty-six hours in summer. According to the investigations of Mackenzie in Calcutta, the average duration is nineteen hours and twelve minutes, the shortest period being three hours, and the longest forty hours. In general, rigor mortis sets in 1 to 2 hours after death, is well developed from head to foot in about 12 hours, is maintained for about 12 hours and passes off in about 12 hours. Taking into consideration the variance in appearance and disappearance of rigor mortis depending upon climatic factors, it can safely be said that the rigor mortis in any case would be complete in 12 hours. It is normally when the rigor mortis start passing off staining starts setting. There is a time lag of 13 hours between the death

and post-mortem of Geetha. Considering that rigor mortis were established and retained all over the body and post-mortem staining were present at the back, it would clearly show that the death had taken place around the time as stated by the prosecution. The contention of the learned counsel that Geetha died far before the time as suggested by the prosecution, in view of the findings of the doctor with regard to rigor mortis that it was established and retained all over and post-mortem staining was present at the back, is repelled. Equally devoid of merit is the contention of the learned counsel that it was a case of accidental death and not homicidal. In the unchallenged opinion of the doctor, the death was due to constrictive force applied to the neck. There was fracture of thyroid cartilage due to pressure applied on the neck and it is a case of asphyxial death due to application of force on the neck and in the opinion of the doctor, the force used was sufficient to cause death in the ordinary course of nature. Injury No.3 has been described as 'pressure abrasion 5 x 0.8 cm. front of neck horizontal right end 3 cm below jaw border'**.** Doctor clearly stated that injury No.3 could be caused only by ligature material, even though he said that it may

not be by hand. Injury No.4 is 'contused abrasion 6x5 cm on right side of neck'. The medical evidence overwhelmingly proves homicidal death of Geetha. If at all, it could be, at the most a suicidal death, but that possibility is also ruled out in view of the evidence of doctor that there was struggle at the time of death. The other injuries found on the dead body of Geetha would also suggest that she struggled before death. The present is, thus, an out and out case of homicidal death. Possibility of it being accidental or even suicidal is completely ruled out on the basis of medical evidence.

9. It is no doubt true that the prosecution relies upon motive and opportunity as the only other two circumstances for securing conviction of the appellant, but in the facts and circumstances of this case, these two circumstances coupled with medical evidence would lead to only one hypothesis that the appellant only was responsible for intentionally causing the death of his wife. The frequent fights between the appellant and his wife prior to the occurrence is an established fact. He alone out of the other persons present in the house could have caused the death. The children of tender age could not possibly cause death

of their mother as she could well resist any attack from them. The occurrence took place at 1.30 in the night when there was no possibility of anyone intruding into the house. Besides the motive that actuated the appellant to commit the crime, there was opportunity for him and him alone to cause the death of his wife. The homicidal death at a time when there was no one present in the house but for the appellant, coupled with the motive and non-explanation as to how and why his wife died, would prove his complicity in the crime beyond shadow of any doubt. The Supreme Court in **Babu S/o.Raveendran** v. **Babu S/o.Bahuleyan and another** (2003 SCC (Cri) 1569) held that when there is last seen together circumstances leading to the death of deceased the onus to give some explanation in respect of the death lies on the accused. It was also a case of husband murdering his wife on the next night of their marriage by strangulating her with a *lungi*. Both wife and her husband were closeted in a bedroom on the night of occurrence. It was the prosecution case that husband murdered his wife as she refused to cohabit with husband on the bridal night and the next night due to his premarital affair with another woman. The dead body

along with *lungi* was recovered from a nearby well. Considering that on the fateful day husband and wife were together, it was held that it was for the husband alone to explain the circumstances leading to the death of the wife. The circumstances taken together cumulatively would unerringly point only to the guilt of the husband. Even though the appeal was against order of acquittal, it was allowed on the main circumstance relied upon and proved that the husband and wife were closeted together at the time of occurrence and there was no explanation coming from the husband as to how his wife had died. The counsel for the appellant, however, relies on the judgment of the Honourable Supreme Court in **Dasari Siva Prasad Reddy** v. **Public Prosecutor** [(2004) 11 SCC 282). But the facts of that case would reveal that an irresistible inference that the accused was present in his house (at the place of occurrence) on the night in question could not be fully established. In the present case, there is overwhelming evidence, inclusive of that of the son of the appellant, who even though did not support the prosecution case and was not declared hostile to the effect that the appellant was present in the house in the night when the occurrence took place.

We have already made a mention of the prosecution witnesses who in unison have stated that the appellant was present in the house on the intervening night of 31st January and 1st February of 2002.

In view of the discussion as made above, we are of the view that the prosecution has proved its case beyond shadow of any reasonable doubt. The learned Sessions Judge, Thrissur arrived at a correct conclusion in returning a finding of guilt. There is no illegality of impropriety in the order passed by the learned Sessions Judge. The appeal is devoid of any merit and the same is accordingly dismissed.

V.K.Bali
Chief Justice

S.Siri Jagan
Judge

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